

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SALMON SPAWNING &
RECOVERY ALLIANCE,
WILD FISH CONSERVANCY,
NATIVE FISH SOCIETY, and
CLARK-SKAMANIA FLYFISHERS,

Plaintiffs,

v.

D. ROBERT LOHN, in his official
capacity, NATIONAL OCEANIC
AND ATMOSPHERIC
ADMINISTRATION'S NATIONAL
MARINE FISHERIES SERVICE,
CARLOS M. GUTIERREZ, in his
official capacity, UNITED STATES
DEPARTMENT OF COMMERCE,
REN R. LOHOEFENER, in his official
capacity, UNITED STATES FISH
& WILDLIFE SERVICE,
DIRK KEMPTHORNE, in his official
capacity, and UNITED STATES
DEPARTMENT OF THE INTERIOR,

Defendants.

No. C06-1462RSL

ORDER DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT

I. INTRODUCTION

This case concerns a challenge to two decisions by National Marine Fisheries Service ("NMFS") involving Puget Sound Chinook salmon: the approval of a resource management

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1 plan prepared by the Puget Sound Indian Tribes and the Washington Department of Fish and
 2 Wildlife (“WDFW”), and the biological opinion issued by NMFS regarding the effects of its
 3 decision to approve the plan.

4 The suit arises under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*,
 5 for judicial review of a federal administrative action. The matter comes before the Court on
 6 Salmon Spawning & Recovery Alliance, *et al.*’s (collectively “plaintiffs”) motion for summary
 7 judgment (Dkt. ##18, 19) and D. Robert Lohn, *et al.*’s (collectively “defendants” or “NMFS”)
 8 cross-motion for summary judgment (Dkt. ##30, 31). The Indian Tribes¹ and WDFW are also
 9 participating in this matter as *amici curiae* (collectively “*amici*”) and oppose plaintiffs’ motion
 10 and support NMFS’s cross-motion. See Dkt. #28 (Memorandum of Amici Curiae Indian Tribes
 11 and WDFW); Dkt #36 (Reply Memorandum).

12 On March 13, 2008, the Court held a hearing on the motions and heard oral argument
 13 from counsel for plaintiffs, defendants, and *amici*. For the reasons set forth below, the Court
 14 denies plaintiffs’ motion for summary judgment and grants defendants’ cross-motion for
 15 summary judgment.

16 II. DISCUSSION

17 A. Background

18 Salmon fishing in Puget Sound is regulated under the continuing jurisdiction of U.S. v.
 19 Washington (Case No. 70-9213) (W.D. Wash.). In 1985, the court approved the Puget Sound
 20 Salmon Management Plan (“PSSMP”) as a consent decree for management by the Northwest

21
 22 ¹ The following Tribes have appeared as *amici curiae*: the Jamestown S’Klallam Tribe, the
 23 Lower Elwha Klallam Tribe, the Lummi Nation, the Makah Tribe, the Muckleshoot Tribe, the Nisqually
 24 Tribe, the Nooksack Indian Tribe, the Port Gamble S’Klallam Tribe, the Puyallup Tribe of Indians, the
 25 Sauk-Suiattle Indian Tribe, the Skokomish Tribe, the Squaxin Island Tribe, the Swinomish Indian Tribal
 26 Community, and the Tulalip Tribes. See Dkt. ##22, 26; see also Dkt. #27 (Order Regarding Participation
 of WDFW as *amici curiae*).

1 Washington Treaty Tribes and the State of Washington (the “co-managers”). See AR 18. The
 2 co-managers manage salmon fisheries in Puget Sound and the Strait of Juan de Fuca. See AR
 3 196. These fisheries include recreational, commercial, ceremonial, and subsistence fisheries in
 4 both marine and freshwater areas. Id.

5 The Puget Sound Chinook Evolutionary Significant Unit (“ESU”) (*Oncorhynchus*
 6 *tshawytscha*) is listed as threatened under the Endangered Species Act (“ESA”). See 50 C.F.R. §
 7 223.102 (1999) (listing Puget Sound Chinook as threatened); see id. (2005) (defining locations
 8 where they are listed). On March 1, 2004, WDFW and the Puget Sound Indian Tribes
 9 completed a multi-year plan for management of Puget Sound Chinook, titled *Comprehensive*
 10 *Management Plan for Puget Sound Chinook: Harvest Management Component*. See AR 15
 11 (hereinafter the “RMP” or “Resource Management Plan”). The RMP proposes regulation of
 12 commercial, recreational, ceremonial, and subsistence salmon fisheries potentially affecting the
 13 Puget Sound Chinook ESU within the marine and freshwater areas of Puget Sound. See AR 7 at
 14 1.

15 The co-managers requested NMFS’s approval of the RMP. See AR 16 at 2. As a result,
 16 on April 15, 2004, NMFS published a notice of availability for public review and comment on
 17 NMFS’s evaluation of the RMP. See AR 6; 69 Fed. Reg. 19975 (Apr. 15, 2004). The comment
 18 period closed on May 17, 2004. Id. On December 16, 2004, NMFS issued a Biological Opinion
 19 (“BiOp”) on its recommended decision to approve the RMP. See AR 2. On January 27, 2005,
 20 NMFS staff submitted a recommended decision. See AR 3 (the “ERD”). The ERD
 21 recommended approval of the RMP. Id. at 2. On March 4, 2005, NMFS’s Regional
 22 Administrator approved the RMP. See AR 4 at 5. The same day, the Regional Administrator
 23 issued a Record of Decision relating to its Environmental Impact Statement pursuant to the
 24 National Environmental Policy Act (“NEPA”). See AR 5; 42 U.S.C. § 4332(C). On March 11,
 25

1 2005, NMFS announced its approval of the RMP and responded to comments received. See AR
2 9; 70 Fed. Reg. 12194 (Mar. 11, 2005). Under these approvals, the RMP has been approved by
3 NMFS for the period May 1, 2005 through April 30, 2010. Id. In this action, plaintiffs
4 challenge NMFS's approval of the RMP and the BiOp.

5 **B. Analysis**

6 The Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, defines two distinct
7 categories of protected species. An "endangered" species is any species "which is in danger of
8 extinction throughout all or a significant portion of its range." Id. at § 1532(6). In contrast, a
9 "threatened" species is one that "is likely to become an endangered species within the
10 foreseeable future." Id. at § 1532(20). Section 9 of the ESA prohibits "any person" from
11 "taking" a species listed as endangered. Id. at §1538. "'Take' means to harass, harm, pursue,
12 hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." Id.
13 at § 1532(19). By itself, section 9 does not prohibit the take of "threatened" species. Section
14 4(d) of the ESA, however, allows agencies to apply section 9's prohibitions to "threatened"
15 species. Id. at § 1533(d) (stating "[w]henver any species is listed as a threatened species
16 pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems
17 necessary and advisable to provide for the conservation of such species. The Secretary may by
18 regulation prohibit with respect to any threatened species any act prohibited under section
19 9(a)(1) [16 U.S.C. § 1538(a)(1)], in the case of fish or wildlife . . . with respect to endangered
20 species[.]"). These regulations are known as "Section 4(d) Rules."

21 On January 3, 2000, NMFS issued a final Section 4(d) Rule for Puget Sound Chinook.
22 See 50 C.F.R. § 223.203 (2000). This rule concluded that the take prohibitions applicable to
23 endangered species are necessary and advisable for the conservation of the threatened Puget
24 Sound Chinook. See 65 Fed. Reg. 42422, 42423 (July 10, 2000). NMFS, however, also

1 concluded that it was not necessary and advisable to impose the take prohibitions to thirteen
 2 programs because the programs contribute to the conservation of the ESU. Id. The conditions
 3 on which these programs are not subject to the section 9 “take” prohibition are referred to as
 4 “Limits.” Id.; 50 C.F.R. § 223.203(b). The relationship between two of these Limits—Limit 4
 5 and Limit 6—is at the heart of plaintiffs’ claims in this case.

6 **C. Standard of Review**

7 Defendants’ final agency actions² made pursuant to the ESA are reviewed in accordance
 8 with the APA. Under the APA, a court may disturb an agency’s final action only if that final
 9 action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”
 10 5 U.S.C. § 706(2)(A). This standard is “highly deferential, presuming agency action to be valid
 11 and affirming the agency action if a reasonable basis exists for its decision.” Indep. Acceptance
 12 Co. v. California, 204 F.3d 1247, 1251 (9th Cir. 2000) (citation and quotation marks omitted).
 13 Courts are “deferential to the agency’s expertise in situations, like that here, where ‘resolution of
 14 this dispute involves primarily issues of fact.’” Arizona Cattle Growers’ Ass’n v. United States
 15 Fish and Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001) (quoting Marsh v. Or. Natural Res.
 16 Council, 490 U.S. 360, 377 (1989) (“Because analysis of the relevant documents ‘requires a
 17 high level of technical expertise,’ we must defer to the informed discretion of the responsible
 18 federal agencies.”) (citations omitted)). Therefore, the “reviewing court may set aside only
 19 those conclusions that do not have a basis in fact, not those with which it disagrees.” Arizona
 20 Cattle Growers’ Ass’n, 273 F.3d at 1236. This deferential standard, however, does not shield

21
 22 ² Defendants do not contest that the actions at issue in this case are “final agency actions”
 23 reviewable by the Court. See Bennett v. Spear, 520 U.S. 154, 177-78 (1997); see also Nat’l Wildlife
 24 Fed’n v. Nat’l Marine Fisheries Serv., 481 F.3d 1224, 1231 (9th Cir. 2007) (holding that the issuance of
 25 a biological opinion is considered a final agency action, and therefore subject to judicial review) (citing
 26 Bennett, 520 U.S. at 178); Sierra Club v. Marsh, 816 F.2d 1376, 1384-85, 1388-89 (9th Cir. 1987)
 (failure to reinstate consultation is reviewable).

the agency from a “thorough, probing, in-depth review” by the Court. Seattle Audubon Soc’y v. Moseley, 798 F. Supp. 1473, 1476 (W.D. Wash. 1992) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). “Judicial review is meaningless,” unless the Court carefully reviews the record “to ‘ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.’” Arizona Cattle Growers’ Ass’n, 273 F.3d at 1236 (quoting Marsh, 490 U.S. at 378).

The parties in this case have filed cross-motions for summary judgment. “Summary judgment is an appropriate procedure for resolving a challenge to a federal agency’s administrative decision when review is based upon the administrative record, even though the court does not employ the standard of review set forth in Rule 56.” Maine v. Norton, 257 F. Supp. 2d 357, 363 (D. Me. 2003) (citing Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985)).

D. Plaintiffs’ Claims

Plaintiffs move for summary judgment on three primary issues, claiming that: (1) NMFS violated the APA and section 7 of the ESA (16 U.S.C. § 1536) when it approved the RMP; (2) NMFS violated section 7 in adopting a BiOp evaluating the impact of approving the RMP on threatened Puget Sound Chinook; and (3) NMFS acted unlawfully by failing to reinstate consultation on the BiOp concerning the RMP in light of new information regarding the impact of the harvest on Puget Sound Chinook. See Dkt. #18 at 1-2; Dkt. #19 at 2. The Court reviews plaintiffs’ claims, under the applicable abuse of discretion standard, in turn, below.

1. The Resource Management Plan (“RMP”)

Before turning to plaintiffs’ specific claims, the Court notes that this is not the first case in this judicial district concerning § 223.203(b)’s Limits. In Washington Env’tl. Council v. NMFS (Case No. C00-1547R), the plaintiffs claimed that NMFS did not have the authority to

1 create a limited take prohibition under the Section 4(d) rules. Washington Env'tl. Council v.
 2 NMFS, 2002 U.S. Dist. Lexis 5432, at *21 (W.D. Wash. Feb. 26, 2002). Unlike the plaintiffs in
 3 Washington Env'tl. Council, however, plaintiffs here do not challenge NMFS's authority to
 4 promulgate the Limits at issue in this case or the rules themselves.³ Cf. Christy v. Hodel, 857
 5 F.2d 1324, 1336 (9th Cir. 1988) (holding that the 4(d) Rules do not unconstitutionally delegate
 6 legislative authority to the Secretary). Rather, plaintiffs here challenge NMFS's interpretation
 7 and application of these Limits in approving the RMP. See, e.g., Dkt. #19 at 22 ("NMFS
 8 interpreted 'viable' to mean only that population of fish that NMFS estimates is the current
 9 carrying capacity of the relevant habitat."). The first interpretive conflict between the parties
 10 concerns which Limit governs NMFS's actions.

11 Plaintiffs assert that Limit 4 governs this case. See Dkt. #34 at 3-4. In contrast, NMFS
 12 contends that its actions should be judged by Limit 6's criteria. See Dkt. #30 at 17 ("[C]ontrary
 13 to Plaintiffs' claim, NMFS's determination is governed by the requirements of Limit 6, rather
 14 than the requirements of Limit 4."); AR 3 at 2 (applying Limit 6's criteria).

16 ³ See id. at *23 (denying plaintiffs' claim that NMFS does not have authority to create a limited
 17 take provision, stating: "The language of 4(d) makes it clear that NMFS 'may' impose a take prohibition.
 18 . . . It is logically within the agency's discretion, therefore, that applying any number of different varieties
 19 of (otherwise legal) take prohibitions is also within NMFS's discretion. The court is not persuaded that
 20 choosing to promulgate a limited take prohibition under § 4(d) was arbitrary and capricious. . . . The
 21 court, emphasizes that its ruling upholding NMFS's statutory authority to use § 4(d) to promulgate a
 22 limited take prohibition in no way is intended to sanction the substance of the rule, let alone the science of
 23 the [Forests and Fish Report]. The court, as discussed above, finds a ruling on whether the rule meets
 24 the conservation mandate of the ESA to be premature at this time.").

25 Plaintiffs here have not challenged whether the substance of § 223.203(b) furthers a conservation
 26 purpose, but rather NMFS's interpretation of § 223.203(b)'s Limits as applied to the approval of the
 RMP. Cf. Sierra Club v. Clark, 755 F.2d 608, 615 (8th Cir. 1985) (facially invalidating regulation
 allowing sport trapping of the Eastern Timber Wolf on the ground that it exceeded the scope of the
 Secretary's authority to provide for the "conservation" of threatened species under 16 U.S.C. § 1533(d)
 and § 1552(3) (defining "conservation")).

Based on the plain language of Limit 6, and for the reasons articulated below, the Court concludes that Limit 6 applies here and NMFS did not act arbitrarily and capriciously by reviewing the RMP under Limit 6. Limit 6 provides:

(6) The prohibitions of paragraph (a) [the “take” prohibitions of section 9(a)(1) of the ESA] of this section relating to threatened species of salmonids listed in [50 C.F.R.] § 222.102(a) [including Puget Sound Chinook] do not apply to actions undertaken in compliance with a resource management plan developed jointly by the States of Washington, Oregon and/or Idaho and the Tribes (joint plan) within the continuing jurisdiction of United States v. Washington [384 F. Supp. 312 (W.D. Wash. 1974)] or United States v. Oregon, the on-going Federal court proceedings to enforce and implement reserved treaty fishing rights, provided that:

(i) The Secretary has determined pursuant to 50 CFR 223.209 [amended as § 223.204; see 70 Fed. Reg. 37160, 37203 (June 28, 2005)] and the government-to-government processes therein that implementing and enforcing the joint tribal/state plan will not appreciably reduce the likelihood of survival and recovery of affected threatened ESUs.

(ii) The joint plan will be implemented and enforced within the parameters set forth in United States v. Washington or United States v. Oregon.

(iii) In making that determination for a joint plan, the Secretary has taken comment on how any fishery management plan addresses the criteria in § 223.203(b)(4) [Limit 4], or on how any hatchery and genetic management plan addresses the criteria in § 223.203(b)(5).

(iv) The Secretary shall publish notice in the Federal Register of any determination whether or not a joint plan, will appreciably reduce the likelihood of survival and recovery of affected threatened ESUs, together with a discussion of the biological analysis underlying that determination.

(v) On a regular basis, NMFS will evaluate the effectiveness of the joint plan in protecting and achieving a level of salmonid productivity commensurate with conservation of the listed salmonids. If the plan is not effective, then NMFS will identify to the jurisdiction ways in which the joint plan needs to be altered or strengthened. If the responsible agency does not make changes to respond adequately to the new information, NMFS will publish notification in the Federal Register announcing its intention to withdraw the limit on activities associated with that joint plan. Such an announcement will provide for a comment period of no less than 30 days, after which NMFS will make a final determination whether to withdraw the limit so that take prohibitions would then apply to that joint plan as to all other activity not within a limit.

50 C.F.R. § 223.203(b)(6).

Limit 6 expressly states that it applies to resource management plans developed “jointly

1 by the State[] of Washington . . . and the Tribes within the continuing jurisdiction of United
 2 States v. Washington.” Id. The challenged actions here are directed at NMFS’s review of the
 3 RMP, which was prepared jointly by the Tribes and WDFW in light of United States v.
 4 Washington. See AR 15 at 5 (stating “[t]he management regime will be guided by the principles
 5 of the Puget Sound Salmon Management Plan (PSSMP), and other legal mandates pursuant to
 6 U.S. v. Washington. . . . The PSSMP is the framework for planning and managing harvest so
 7 that treaty rights will be upheld and equitable sharing of harvest opportunity and benefits are
 8 realized.”). Although not binding on the Court, the RMP itself states that it was prepared for
 9 review under Limit 6. Id. at 2 (“This Plan will be submitted to . . . NMFS, for evaluation under
 10 the conservation standards of the Endangered Species Act. Criteria for exemption of state /
 11 tribal resource management plans from prohibition of the ‘take’ of listed species, are contained
 12 under Limit 6 of the salmon 4(d) Rule.”).

13 The Court rejects plaintiffs’ argument that Limit 4 provides the “general requirements”
 14 for management plans and that Limit 6 simply provides “additional requirements” for a jointly
 15 prepared state-tribal RMP. See Dkt. #19 at 4. Each Limit is directed at a specific program. See
 16 65 Fed. Reg. 42422, 42423-24 (July 10, 2000) (preamble to final regulation). Limit 4 expressly
 17 applies to state Fishery Management and Evaluation Plans (“FMEP”). See 50 C.F.R. §
 18 223.203(b)(4). In contrast, Limit 6 applies to RMPs like the one at issue in this case, prepared
 19 jointly by the State and Tribes under United States v. Washington. Id. at § 223.203(b)(6). As
 20 NMFS explained in the proposed rule, where a joint agreement between a state and tribe is
 21 required, Limit 6 applies. See 65 Fed. Reg. 170, 177 (Jan. 3, 2000) (“Agreements adopted
 22 within the United States v. Washington proceeding, such as the Puget Sound Management Plan
 23 (originally approved by the court in 1977; most recent amendment approved by the court in
 24 United States v. Washington, 626 F. Supp. 1405, 1527 (1985, W.D. Wash.))[] mandate that
 25 harvest and artificial production management actions are agreed to and coordinated between the

1 State of Washington and the Western Washington treaty tribes. Where joint agreement is
 2 required, such plans will fall under the provisions of paragraphs (b)(6)(i)-(iv) [Limit 6] of
 3 section 223.203 contained in this proposed rule.”).

4 Under Limit 6, the overall standard for NMFS’s approval of the RMP is a determination
 5 that the RMP “will not appreciably reduce the likelihood of survival and recovery of affected
 6 threatened ESUs.” 50 C.F.R. § 223.203(b)(6)(i). Therefore, the Court’s overall determination
 7 in this case is whether NMFS was arbitrary and capricious in determining that the RMP would
 8 not appreciably reduce the likelihood and survival of Puget Sound Chinook. This, however,
 9 does not end the inquiry regarding the applicability of Limit 4 because Limit 6 expressly states
 10 that in making a determination that the joint plan is exempt from section 9’s take prohibitions,
 11 “the Secretary has taken comment on how any fishery management plan addresses the criteria in
 12 [Limit 4].” 50 C.F.R. § 223.203(b)(6)(iii). Limit 4 contains nine separate “criteria” that must be
 13 adequately addressed by a plan. These nine “criteria” are listed as (A) through (I) under §
 14 223.203(b)(4)(i) in Limit 4. See 50 C.F.R. § 223.203(b)(4)(i) (stating “[t]he plan must
 15 adequately address the following criteria” and then enumerating nine criteria in §
 16 223.203(b)(4)(i)(A) - (I)).

17 Plaintiffs contend that NMFS failed to adequately address three of Limit 4’s criteria in
 18 approving the RMP: criteria B, criteria C, and criteria H. The Court addresses plaintiffs’
 19 arguments with respect to each criteria, separately, below.

20 **a. Limit 4—Criteria B**

21 Because the bulk of plaintiffs’ case against defendants is directed at NMFS’s alleged
 22 failure to adequately address criteria B, the Court quotes the text of criteria B in full, below:

23 The plan must adequately address the following criteria: . . . (B) Utilize the
 24 concepts of “viable” and “critical” salmonid population thresholds, consistent with
 25 the concepts contained in the technical document entitled “Viable Salmonid
 Populations (NMFS, 2000b).” The VSP paper provides a framework for
 identifying the biological requirements of listed salmonids, assessing the effects of

management and conservation actions, and ensuring that such actions provide for the survival and recovery of listed species. Proposed management actions must recognize the significant differences in risk associated with viable and critical population threshold states and respond accordingly to minimize the long-term risks to population persistence. Harvest actions impacting populations that are functioning at or above the viable threshold must be designed to maintain the population or management unit at or above that level. For populations shown with a high degree of confidence to be above the critical levels but not yet at viable levels, harvest management must not appreciably slow the population's achievement of viable function. Harvest actions impacting populations that are functioning at or below [the] critical threshold must not be allowed to appreciably increase genetic and demographic risks facing the population and must be designed to permit the population's achievement of viable function, unless the plan demonstrates that the likelihood of survival and recovery of the entire ESU in the wild would not be appreciably reduced by greater risks to that individual population.

50 C.F.R. § 223.203(b)(4).

(i) Viability concept

Plaintiffs' first contention under criteria B is that in approving the RMP, NMFS departed from what constitutes a "viable" salmonid population threshold as that concept is defined in the technical document titled "Viable Salmonid Populations (NMFS, 2000b)." See Dkt. #19 at 21; AR 241 (NOAA Technical Memorandum NMFS-NWFSC-42; "Viable Salmonid Populations and the Recovery of Evolutionary Significant Units") (hereinafter the "VSP"). The purpose of the VSP "is to provide an explicit framework for identifying attributes of viable salmonid populations so that parties may assess the effects of management and conservation actions and ensure that their actions promote the listed species' survival and recovery." AR 241 at 1. The VSP defines "viable salmonid population" as "an independent population of any Pacific salmonid (genus *Oncorhynchus*) that has a negligible risk of extinction due to threats from demographic variation (random or directional), local environmental variation, and genetic diversity changes (random or directional) over a 100-year time frame." Id. at 2.

Plaintiffs' primary contention regarding criteria B of Limit 4 is that NMFS redefined "viable" in its approval of the RMP to mean the carrying capacity of current habitat conditions,

1 and therefore produced a “viable” threshold smaller than that intended by the Limit 4 and the
2 VSP, and did not consider the risk of extinction. See Dkt. #19 at 22. Plaintiffs’ claims are
3 founded on the principle that NMFS was required to apply the definition of “viable” as defined
4 in the VSP when evaluating the RMP. See Dkt. #34 at 10 (“By judging the impacts of the
5 Harvest Plan [RMP] using viability thresholds that are not an indication of extinction risk,
6 NMFS failed to assure that the [RMP] uses the concept of ‘viable’ in a way that is consistent
7 with the VSP Paper, as required by [Limit 4]. Its decision was, therefore, contrary to law, and
8 so a violation of the APA.”). The Court, concludes, however that NMFS satisfied the
9 requirements of Limit 6 in considering criteria B of Limit 4.

10 First, Limit 6 only expressly requires that NMFS has “taken comment on how any fishery
11 management plan addresses the criteria in § 223.203(b)(4) [Limit 4].” In approving the RMP,
12 NMFS did in fact take comment on the Limit 4 criteria. See AR 9.

13 Second, criteria B of Limit 4 does not mandate that an RMP must use a particular
14 “viable” or “critical” threshold. Criteria B of Limit 4 only requires that the “concepts of ‘viable’
15 and ‘critical’ salmonid population thresholds” are “consistent with the concepts” in the VSP. 50
16 C.F.R. § 223.203(b)(4)(i)(B). Although plaintiffs attempt to convert the VSP itself into a
17 proscriptive standard, in promulgating the 4(d) Rules, NMFS explicitly stated that the
18 documents cited in the Limits were meant to provide guidance, not to create binding criteria. In
19 the preamble to the final rule for example, NMFS states: “These technical documents [cited in §
20 223.203] provide guidance to entities as they consider whether to submit a program for a 4(d)
21 limit. The documents represent several kinds of guidance, and are not binding regulations
22 requiring particular actions by any entity or interested party.” 65 Fed. Reg. 42422, 42424 (July
23 10, 2000) (emphasis added). With respect to the cited technical documents in the Limits, the
24 preamble to the final rule goes on to conclude that “where the rule cites a document, a program’s
25 consistency with the guidance is ‘sufficient’ to demonstrate that the program meets the particular

1 purpose for which the guidance is cited. However, the entity or individual wishing a program to
 2 be accepted as within a particular limit has the latitude to show that its variant or approach is, in
 3 the circumstances where it will apply and affect listed fish, equivalent or better.” Id. (emphasis
 4 added).

5 Furthermore, the VSP does not mandate any particular standard or methodology. Instead,
 6 it consists of two components: (1) principles for identifying population substructure in Pacific
 7 salmonid ESUs; and (2) general principles for establishing biological guidelines to evaluate the
 8 conservation status of these populations. See AR 241 at 2. The VSP Paper identifies four
 9 parameters for evaluating the conservation status of a population, including: (1) abundance, (2)
 10 growth rate or productivity, (3) spatial structure, and (4) diversity that are “reasonable
 11 predictors” of viability. Id. at 11. The VSP Paper also provides general guidelines for
 12 evaluating each of these parameters. Id. at 14-15. Additionally, as criteria B in Limit 4
 13 expressly states, the VSP is a “framework” for evaluating viable populations, it does not
 14 mandate how these evaluations must be applied. Thus, plaintiffs’ claim that NMFS acted
 15 contrary to law by failing to specifically use the definition of “viable” as defined by the VSP is
 16 unavailing.

17 (ii) Extinction risk

18 The Court also rejects plaintiffs’ contention that NMFS failed to consider extinction risk
 19 in assessing the RMP. See Dkt. #19 at 22 (“Avoiding extinction was not part of NMFS’s
 20 equation”); #34 at 10 (“By judging the impacts of the Harvest Plan [RMP] using viability
 21 thresholds that are not an indication of extinction risk, NMFS failed to assure that the [RMP]
 22 uses the concept of ‘viable’ in a way that is consistent with the VSP Paper, as required by [Limit
 23 4].”). In its decision, NMFS founded its evaluation of the RMP based on the VSP and a paper
 24 entitled “A Risk Assessment Procedure for Evaluating Harvest Mortality on Pacific Salmonids”
 25 (the “RAP”). See AR 3 at 7; 24. The RAP, dated May 30, 2000, was developed

1 contemporaneously with the VAP.⁴ See AR 58 (RAP). The RAP was developed to provide a
 2 management tool linking “available biological data about the listed species with quantified
 3 standards of acceptable risk to survival and recovery.” AR 58 at 2. The RAP was also expressly
 4 developed consistent with the concepts of the VSP Paper. See id. at 4. In its decision, by
 5 utilizing the RAP, NMFS used viable and critical thresholds to identify rebuilding exploitation
 6 rates (“RERs”). See AR 3 at 7; 25. As set forth in the RAP, the RER is the maximum rate of
 7 harvest by which: (1) the percentage of escapements below the critical threshold must differ no
 8 more than 5% from that under the baseline conditions [or, a no-fishing scenario]; and (2) either
 9 the viable threshold must be met 80% of the time, or the percentage of escapements less than the
 10 viable threshold must differ no more than 10% from that under the baseline [no-fishing]
 11 condition.” AR 58 at 9-10. Significantly here, the RERs assess extinction risk because the
 12 critical threshold is the point of population instability below which the risk of extinction
 13 increases. See AR 7 at C-6. Therefore, contrary to plaintiffs’ contention, NMFS applied
 14 specific thresholds as part of its evaluation to assess the risk of extinction.

15 (iii) Carrying capacity and current habitat conditions

16 Plaintiffs also contend that NMFS’s use of a current conditions viability threshold departs
 17 from the VSP and is therefore contrary to law. See Dkt. #34 at 5 (“By defining ‘viability’ based
 18 on current carrying capacity, NMFS departed from the concept of ‘viable thresholds’ articulated
 19 in the VSP Paper, and also departed from the requirements of the 4(d) Rule.”); 9. In response to
 20

21 ⁴ NMFS described the relationship between the VSP and the RAP in the RAP itself, stating:
 22 “Both RAP and VSP operate at the population level. However, although VSP offers general guidelines
 23 for biological characteristics of a population at increased risk or robust to risk, it is not population
 24 specific and it does not assess an action’s effects over time. Consequently, models are needed that look
 25 at population-specific population dynamics and the effects of proposed actions over time. The result is a
 merging of the thresholds of risk, e.g., VSP, with the effects of an action over time to assist in making
 management decisions, e.g., RAP.” AR 58 at 4 (emphasis added).

1 this claim, NMFS correctly asserts that the VSP itself recognizes that “carrying capacity”⁵ is an
2 important part of its viability framework: “[c]apacity parameters are important for evaluating
3 population viability in that they describe the scope for a population or some component of a
4 population to exceed requisite abundance thresholds.” AR 241 at 69. Therefore, NMFS’s use
5 of carrying capacity is consistent with the concepts in the VSP Paper.

6 Additionally, under the ESA and the 4(d) Rule at issue here, § 223.203(b)(6), the ultimate
7 issue is whether operation of the plan will not appreciably reduce the likelihood of survival and
8 recovery of the species. See Nat’l Wildlife Fed’n, 481 F.3d at 1236. The specific requirement
9 in criteria B of Limit 4 requires that implementation of harvest plans must not “appreciably
10 slow” the population’s achievement of “viable function” with respect to populations above the
11 critical threshold but below viable levels. 50 C.F.R. § 223.203(b)(4)(i)(4). To the extent
12 recovery, or achievement of viable populations, is limited by current habitat conditions, it cannot
13 be said that the operation of the RMP at issue in this case is appreciably reducing the likelihood
14 of recovery or slowing the achievement of viable populations. See Dkt. #36 at 6 (*Amici* Reply).
15 NMFS’s recognition of current conditions for the five-year RMP at issue is appropriate given
16 that in developing the RAP, NMFS acknowledged that “the effect of changes in land use and the
17 improvements from current restoration efforts won’t be measurable for at least another 20 years”
18 and therefore “it is reasonable to assume that conditions in the next twenty to thirty years might
19 be similar to those observed over the past 10-15 years.” AR 58 at 10. As NMFS notes in its
20 reply, given the uncertainty of when, and if at all, habitat improvements may be made, “[u]sing
21 current conditions provides a realistic and more conservative evaluation of these effects and
22 facilitates recovery if the hoped-for habitat improvements occur.” Dkt. #35 at 9; see Nat’l

24 ⁵ Carrying capacity measures “the size of a population sustainable by the environment.” AR 241
25 at 68.

1 Wildlife Fed’n, 481 F.3d at 1235 (requiring NMFS to consider proposed operations in their
2 “actual context”). For these reasons, NMFS’s use of current habitat conditions in assessing the
3 RMP was not arbitrary and capricious or contrary to law.

4 **(iv) Technical Recovery Team (TRT) thresholds**

5 Finally, plaintiffs argue that NMFS failed to use its Technical Recovery Team’s (“TRT”)⁶
6 viable population ranges to evaluate the RMP thresholds, and instead developed its own
7 thresholds based on current habitat conditions. See Dkt. #19 at 7-8; Dkt. #34 at 15 (“Plaintiffs
8 fault NMFS for failing to listen to the agency’s own experts—in particular, the Technical
9 Recovery Team that NMFS appointed to develop recovery criteria for Puget Sound Chinook.”);
10 25.

11 Contrary to plaintiffs’ contentions, however, NMFS considered the TRT planning ranges
12 in its decision on the RMP and explained why they were not applicable to the RAP analysis of
13 the RMP. See AR 3 at 66 (“The preliminary delisting and recovery criteria recommendation
14 provided by the TRT . . . have been used to assist in the evaluation of the harvest management
15 strategy represented by the RMP.”); 37 (“However, the trend in natural-origin returns, when
16 compared with hatchery returns, into several systems suggests that marine, freshwater, and
17 estuary habitat quality and quantity is the primary constraint on productivity.”). In its decision,
18

19 ⁶ NMFS has explained the function of the TRT as follows: “As part of its recovery planning
20 efforts, NMFS Northwest Region designated ‘recovery domains’ in the Pacific Northwest. Puget Sound
21 is one of five geographically based recovery domains for preparing recovery plans for listed salmon
22 species. . . . For each domain, NMFS convened an independent Technical Recovery Team (TRT) to
23 develop recommendations on biological viability criteria for the ESU and its component populations, to
24 make technical findings regarding limiting factors, to provide scientific support to local and regional
25 recovery planning efforts, and to provide scientific evaluations of recovery plans. The TRT for the Puget
26 Sound Chinook (PSTRT) includes biologists from NMFS, state, tribal, and local agencies.” AR 270 at 3.
Also contrary to plaintiffs’ contention, the TRT cannot reasonably be considered its “own” expert when
only two of the seven members on the team are from NMFS. See AR 70-1 at 1 (listing the seven PSTRT
members).

1 NMFS explained why it did not apply the TRT planning ranges. See AR 3 at 25 (“For most
2 populations, these [viable and critical] thresholds are well below the escapement levels
3 associated with recovery, but achieving these goals under current conditions is a necessary step
4 to eventual recovery when habitat and other conditions are more favorable.”).

5 Second, as NMFS correctly asserts in its reply, NMFS did not utilize the TRT as an
6 “expert” to assist in evaluation of RMPs, nor did the TRT review or comment on the RMP at
7 issue in this case. See Dkt. #35 at 5.

8 Third, NMFS is entitled to deference in its consideration of the TRT planning ranges for
9 purposes of approving the RMP. See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.,
10 378 F.3d 1059, 1066 (9th Cir. 2004) (deferring to agency’s scientific judgment). The cases cited
11 by plaintiffs are inopposite here because in its decision approving the RMP, NMFS offered a
12 credible explanation of its decision to develop thresholds under the RAP rather than use the TRT
13 planning ranges. Cf. N. Spotted Owl v. Hodel, 716 F. Supp. 479, 483 (W.D. Wash. 1988)
14 (stating that the court “will reject conclusory assertions of agency ‘expertise’ where the agency
15 spurns un rebutted expert opinions without itself offering a credible alternative explanation.”);
16 Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 685 (D.D.C. 1997) (declining to defer to the
17 agency because its decision was based on unsupported conclusory allegations and facts directly
18 contradicted by undisputed evidence in the record); Dkt. #34 at 16 (citing N. Spotted Owl &
19 Defenders of Wildlife).

20 Here, in approving the RMP, NMFS considered the TRT preliminary planning ranges and
21 explained why they were not applicable to the RAP analysis of the RMP. For the reasons set
22 forth above, the Court concludes that NMFS’s decision was not arbitrary and capricious.

23 **b. Limit 4—Criteria C**

24 Plaintiffs make an alternative argument concerning NMFS’s use of current carrying
25 capacity connected to criteria C in Limit 4. Plaintiffs contend that even using a current

1 conditions definition of viable, NMFS acted contrary to the recovery requirement of criteria C in
2 Limit 4, which states that “exploitation rates must not appreciably reduce the likelihood of
3 survival and recovery of the ESU,” because two of the five regions—the Georgia Strait and
4 Hood Canal—do not have populations headed for viability. See Dkt. #19 at 25-26; 50 C.F.R. §
5 223.203(b)(i)(C).

6 The TRT guidelines provide that an ESU-wide recovery should include two to four viable
7 populations in each of the five geographic regions within Puget Sound, depending on the
8 historical biological characteristics and acceptable risk levels for populations within each region.
9 See AR 70-01 at 12; AR 3 at 66-68. The Georgia Strait Region has two populations: the North
10 and South Fork Nooksack River populations. See AR 3 at 68. Although NMFS found that these
11 populations had an elevated level of risk when compared to NMFS’s standards, NMFS
12 ultimately concluded based on a number of factors that implementation of the RMP “will
13 adequately protect chinook salmon populations in the Georgia Strait Region.” AR 3 at 68-70.
14 NMFS based its conclusion on several findings, including that both populations in the Georgia
15 Strait exhibited increasing escapement trends since listing (see AR 3 at 29), and that hatchery-
16 origin spawners contributed to the natural spawning areas by buffering harvest-induced genetic
17 risks to the populations. Id.

18 The Hood Canal region consists of two populations: the Skokomish and Mid-Hood Canal
19 River populations. See AR 3 at 74. NMFS ultimately concluded for these populations that “the
20 RMP’s management objectives are adequately protective of the geographic, life history, and
21 diversity of the populations within the Hood Canal Region of the ESU.” Id. at 76. NMFS
22 supported its conclusion based on several factors, including the total abundance status of the
23 population, the increasing escapement trend observed for the population, and the annual
24 monitoring and evaluation actions outlined in the RMP. See id. Additionally, NMFS found that
25 the production of hatchery-origin fish sharing the ecological and genetic traits of the natural-

1 origin population may buffer risk to the population. Id.

2 Plaintiffs also contend that NMFS has not shown that the Cedar and Sammamish River
3 populations would be sustained and improved under the RMP. See Dkt. #19 at 25-26. These
4 two populations comprise two of the six populations in the South Puget Sound Region. See AR
5 3 at 72. Contrary to plaintiffs' assertion however, NMFS specifically found that "the proposed
6 RMP is anticipated to contribute to the stabilization or rebuilding of all populations within this
7 region." Id. (emphasis added). It is true that NMFS identified a concern for the Cedar and
8 Sammamish River populations, but NMFS also stated that "[i]dentifying these two populations
9 as a concern is considered a precautionary approach, as information suggests that the
10 escapements estimated for these systems are likely conservative." Id. at 74. Plaintiffs have
11 failed to point to anything in the record justifying their contention that these populations will not
12 be sustained under the RMP. See Dkt. #19 at 26. NMFS ultimately concluded that "[t]he
13 concerns for the Cedar River and Sammamish River populations do not represent much risk to
14 the region. . . . [and that] NMFS believes that the RMP's management objectives are
15 adequately protective of the geographic distribution, life history characteristics, and genetic
16 diversity of the populations within the South Puget Sound Region of the ESU." AR 3 at 74.

17 For the foregoing reasons, the Court concludes that NMFS's determinations with respect
18 to the populations referenced above are entitled to deference, and that NMFS did not act
19 arbitrarily or capriciously in its consideration of the recovery requirement of criteria C in Limit
20 4.

21 **c. Limit 4—Criteria H**

22 Criteria H of Limit 4 states that a management plan must adequately address "restrictions
23 on resident and anadromous species fisheries that minimize any take of listed species, including
24 time, size, gear, and area restrictions." 50 C.F.R. § 223.203(b)(4)(i)(H). Plaintiffs contend that
25 NMFS failed to evaluate whether allowing the Puget Sound fisheries to harvest at the "critical

1 exploitation rate ceilings” would comply with Rule 4(d), and failed to evaluate whether
 2 introducing widespread use of mark-selective fishing would minimize the take of Puget Sound
 3 Chinook in criteria H. See Dkt. #19 at 26-27; Dkt. #34 at 18-19.

4 Contrary to plaintiffs’ assertion, NMFS expressly did evaluate whether the RMP would
 5 comply with criteria H in Limit 4. Under the section of its decision addressing criteria H, NMFS
 6 states that “[t]he RMP’s rebuilding exploitation rates, upper management thresholds, low
 7 abundance thresholds, and the critical exploitation rates ceilings are the primary elements of the
 8 harvest plan. Time, size, gear, and area and retention restrictions are all among the actions taken
 9 to ensure that salmon fishing-related mortality is consistent with these management
 10 objectives. . . . Actions the co-managers have taken in the past and that will be considered under
 11 the RMP to protect listed species include: closures in the April, May, and June recreational
 12 fisheries and size limits to protect spring chinook salmon; closed spawning grounds to fishing;
 13 and required non-retention of chinook salmon.” AR 3 at 84-85.

14 Nevertheless, plaintiffs specifically contend that NMFS failed to “evaluate whether
 15 introducing widespread use of mark-selective fishing . . . would further minimize the take of
 16 threatened Chinook, as required by the 4(d) Rule” and thereby “effectively excised this
 17 requirement from the regulations.” Dkt. #19 at 26-27. First, there is no express requirement in
 18 criteria H that NMFS must consider the use of “mark-selective fishing.” See 50 C.F.R. §
 19 223.203(b)(4)(i)(H). In its decision, NMFS did address restrictions that minimize take under
 20 criteria H. Second, in response to comments made by plaintiff Washington Trout to the Draft
 21 Environmental Impact Statement, in the Final Environmental Impact Statement NMFS
 22 acknowledged that the co-managers are testing mark-selective fishing in some fisheries, and
 23 “[d]epending on the success of these fisheries, they might be expanded in the future.” AR 7
 24 (FEIS) at 3-65; see Dkt. #30 at 27. For these reasons, the Court concludes that NMFS’s
 25 determination that the RMP adequately addressed the requirements of criteria H in Limit 4 is not

1 arbitrary or capricious.

2 **2. The Biological Opinion (“BiOp”)**

3 Under the ESA, after consultation under 16 U.S.C. § 1536(a), the agency must prepare a
 4 biological opinion. See 16 U.S.C. § 1536(b)(3)(A). The biological opinion must include a
 5 “detailed discussion of the effects of the action on listed species or critical habitat” and NMFS’s
 6 “opinion on whether the action is likely to jeopardize the continued existence of a listed species
 7 or result in the destruction or adverse modification of critical habitat,” (a “jeopardy biological
 8 opinion”), or whether the proposed action poses no such danger (a “no jeopardy biological
 9 opinion.”). 50 C.F.R. § 402.14(h)(2); (3). The BiOp here was approved on December 16, 2004
 10 and considered the impact of NMFS’s determination as to whether the RMP satisfied the ESA
 11 4(d) Rule on the listed Puget Sound Chinook. See AR 4-3 at 2; 4. In this case, plaintiffs
 12 contend that the BiOp is contrary to law because it applied the wrong “jeopardy” standard and
 13 failed to use the best available science as required by the ESA. See Dkt. #19 at 27. The Court
 14 considers plaintiffs’ two claims with respect to the BiOp, below.

15 **a. Jeopardy standard**

16 “Jeopardize the continued existence of” is defined to mean “[a]n action that reasonably
 17 would be expected, directly or indirectly, to reduce appreciably the likelihood of both the
 18 survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or
 19 distribution of that species.” 50 C.F.R. § 402.02. Plaintiffs contend that NMFS’s no-jeopardy
 20 determination in the BiOp is contrary to law “because it does not address the prospects for
 21 recovery of the listed salmon, expressly and impermissibly omitting that goal from its analysis.”
 22 Dkt. #19 at 28.

23 In Nat’l Wildlife Fed’n, the Ninth Circuit held that under the jeopardy standard, the
 24 consulting agency must consider recovery impacts as well as survival. 481 F.3d at 1238. As the
 25 Court has previously concluded, NMFS reviewed the RMP in its ERD under Limit 6, which

1 expressly requires consideration of recovery and survival, requiring a determination “that
 2 implementing and enforcing the joint tribal/state plan will not appreciably reduce the likelihood
 3 of survival and recovery of affected threatened ESUs.” 50 C.F.R. § 223.203(b)(6)(i). As
 4 plaintiffs correctly acknowledge in their motion, the “BiOp is intimately linked to the ERD” and
 5 its “analysis of harvest impacts relevant to this case is identical, or nearly so, to the portions of
 6 the ERD.” Dkt. #19 at 14. Given that the BiOp’s analysis is the same as the ERD, coupled with
 7 the fact that the ERD considered recovery and survival, plaintiffs’ assertion that the BiOp did
 8 not consider recovery and survival fails. See Dkt. #19 at 28.

9 Plaintiffs also contend that NMFS’s no-jeopardy determination in the BiOp was contrary
 10 to law for the same reasons they contend that NMFS’s determination was contrary to the 4(d)
 11 Rule: “NMFS’s derivation of a ‘viable’ population does not seek recovery, but seeks only to
 12 maintain a depressed population under ‘current habitat carrying capacity.’” Id. at 29. The Ninth
 13 Circuit in Nat’l Wildlife Fed’n, stated that the recovery requirement “simply provides some
 14 reasonable assurance that the agency action in question will not appreciably reduce the odds of
 15 success for future recovery planning, by tipping a listed species too far into danger.” 481 F.3d at
 16 1241.

17 In its decision and the BiOp, by using the RAP, NMFS analyzed recovery risks by
 18 utilizing rebuilding exploitation rates. In discussing the viable population under current
 19 conditions, NFMS concluded that “viable and critical thresholds in the context of this evaluation
 20 are a level of spawning escapement associated with rebuilding to recovery, consistent with
 21 environmental conditions. For most populations, these thresholds are well below the
 22 escapement levels associated with recovery, but achieving these goals under current conditions
 23 is a necessary step to eventual recovery when habitat and other conditions are more favorable.”
 24 AR 3 at 25; see Nat’l Wildlife Fed’n, 481 F.3d at 1236 (“Agency action can only ‘jeopardize’ a
 25 species’ existence if that agency action causes some deterioration in the species’ pre-action

1 condition.”) (emphasis added). Therefore, the Court concludes that NMFS appropriately
2 considered the impacts on recovery against the required jeopardy standard.

3 **b. Best available scientific information**

4 Section 1536(a)(2) of the ESA requires that the BiOp must be based on the “best
5 scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). Plaintiffs contend that
6 NMFS violated this requirement by failing to consider what plaintiffs consider to be the best
7 available scientific information—the TRT and the VSP concept of viability—in the BiOp’s no-
8 jeopardy determination. See Dkt. #19 at 29. Plaintiffs’ arguments replicate their objections to
9 NMFS’s approval of the RMP and are unavailing in the context of the BiOp for the same
10 reasons as discussed above in sections II.D.1.a(i) and (iv).

11 Furthermore, as this Court has previously stated, “when there is competing scientific data
12 or expert opinions, a court should defer to the agency’s technical expertise ‘even if, as an
13 original matter, a court might find contrary views more persuasive.’” Ctr. for Biological
14 Diversity v. Lohn, 296 F. Supp. 2d 1223, 1236 (W.D. Wash. 2003) (quoting Marsh, 490 U.S. at
15 378). Plaintiffs rely on Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) for the proposition
16 that if there is any question as to the best available scientific information, the Court should
17 “‘give the benefit of the doubt to the species,” and this Court’s prior conclusion in Ctr. for
18 Biological Diversity that deference to the agency is “warranted only when the agency utilizes,
19 rather than ignores, the analysis of its experts.” Dkt. #19 at 30 (quoting Conner, 848 F.3d at
20 1454; Ctr. for Biological Diversity, 296 F. Supp. 2d at 1239). Significantly in both Conner and
21 Ctr. for Biological Diversity, however, the courts found that the agencies ignored available
22 biological information. Conner, 848 F.3d at 1454 (stating “the FWS cannot ignore available
23 biological information”); Ctr. for Biological Diversity, 296 F. Supp. 2d at 1239 (finding “NMFS
24 ignored its experts’ conclusions”). Here, as discussed in sections II.D.1.a(i) and (iv) above,
25 NMFS did not ignore the work of the VSP or the TRT. Given this fact, and the competing data,

1 the Court defers to NMFS's technical expertise and concludes that NMFS did not act arbitrarily
2 or capriciously with respect to its determination of the best available science in the BiOp.

3 **3. Reinitiation of Section 7 Consultation on the RMP**

4 Under 50 C.F.R. § 402.16: "Reinitiation of formal consultation is required and shall be
5 requested by the federal agency or by the Service, where discretionary Federal involvement or
6 control over the action has been retained or is authorized by law and: . . . (b) [i]f new
7 information reveals effects of the action that may affect listed species or critical habitat in a
8 manner or to an extent not previously considered; [or] (c) [i]f the identified action is
9 subsequently modified in a manner that causes an effect to the listed species or critical habitat
10 that was not considered in the biological opinion[.]"

11 Plaintiffs claim that four specific events have occurred since issuance of the BiOp that
12 should have caused NMFS to reinitiate consultation. See Dkt. #19 at 31. The Court discusses
13 these events below.

14 **a. Canadian harvest**

15 Plaintiffs first contend that the RMP was based on assessment of the combined effect of
16 fisheries in Canada as well as the United States, and because impacts of the timing of the
17 Canadian harvest are greater than anticipated, NMFS should have reinitiated consultation on the
18 RMP. See Dkt. #19 at 32 (citing AR 3 at 15-18, 50-58, 61-66). As an initial matter, the Court
19 notes that the BiOp recognized the potential of an increased Canadian harvest. See AR 4-3 at
20 12-13; Dkt. #30 at 36. Plaintiffs contend in response, however, that "[t]his misses the point"
21 because while the changes in the Canadian fishing industry started in 2000 the effects were not
22 understood until 2006. Dkt. #34 at 27. To support this argument, plaintiffs cite to a Pacific
23 Salmon Commission's Chinook Technical Committee report from July 2006 (the "CTC report").
24 See AR 274 (CTC report); Dkt. #19 at 15 (citing CTC report). As plaintiffs concede, citing the
25 CTC report, "[i]t is difficult to evaluate the impact of Canada's timing shift on specific

1 populations, because of limits on the available . . . data.”). Dkt. #19 at 16. Nevertheless, using
 2 the example of the Nooksack Spring Fingerlings, plaintiffs assert that available data shows that
 3 Canada’s harvest rates on Puget Sound populations are higher than expected. Id. Plaintiffs note
 4 that the average exploitation rate in the West Coast Vancouver Island fishery was nearly 24%
 5 during 2002-2004, but that since NMFS expected an exploitation rate in Canadian fisheries in
 6 the Nooksack River spring chinook of 18%, this new information requires NMFS to reinitiate
 7 consultation. Id.; Dkt. #35 at 19.

8 In response to plaintiffs’ motion on this issue, NMFS contends that “the increased
 9 Canadian harvest on the two populations did not trigger reinitiation because it reflects annual
 10 impacts and is only a piece of a comprehensive whole year class (“brood-year”) productivity
 11 evaluation that requires multi-year data and is done every five years.” Dkt. #30 at 36 (citing AR
 12 3 at 80-81; AR 15 at 59 (listing the assessments to be done every five years). NMFS ultimately
 13 asserted, therefore, that “it would be premature to reinitiate based on the CTC Report, because
 14 until its data is incorporated into the brood-year analysis, its significance is not known, and so is
 15 not the basis for reconsideration of the ERD, nor does it indicate whether any alteration of the
 16 RMP is needed.” Id. at 36-37. Plaintiffs have failed to rebut NMFS’s conclusion on this factual
 17 issue. See Dkt. #34 at 17. Courts are “deferential to the agency’s expertise in situations, like
 18 that here, where ‘resolution of this dispute involves primary issues of fact.’” Arizona Cattle
 19 Growers’ Ass’n, 273 F.3d at 1236 (quoting Marsh, 490 U.S. at 377). Accordingly, the Court
 20 defers to NMFS’s technical expertise and concludes that NMFS’s decision not to reinitiate
 21 consultation on the Canadian harvest was not arbitrary or capricious.

22 **b. Puget Sound Recovery Plan**

23 After issuance of the BiOp, NMFS in 2007 adopted a Puget Sound Recovery Plan. See
 24 72 Fed. Reg. 2493 (Jan. 19, 2007). This recovery plan is comprised of a comprehensive plan
 25 submitted by a regional forum of interests, Shared Strategy for Puget Sound (AR 269), and a

1 supplement prepared by NMFS to include all ESA's required elements (AR 270). Plaintiffs
 2 assert that the 2007 recovery plan's recognition of the 2002 TRT viability planning ranges and
 3 recovery criteria, the VSP parameters as applied to identify viable populations, and the recovery
 4 plan's steps of implementation between 2005 and 2015 constitute "new information" requiring
 5 reconsultation under 50 C.F.R. § 402.16(b). See Dkt. #19 at 17-18; 32-33; Dkt. #34 at 28.

6 The Shared Strategy plan, however, incorporates the RMP as the salmon harvest
 7 component of the recovery plan, and states that should there be a conflict between the RMP and
 8 the plan, the "RMP shall take precedence." AR 269 at 420. Reinitiation is triggered under §
 9 402.16(b) only if the "effects of the action that may affect listed species or critical habitat in a
 10 manner or to an extent not previously considered." Id. (emphasis added). The formal adoption
 11 of the recovery plan, when the RMP is incorporated as a governing document of the recovery
 12 plan, cannot reasonably be considered "new information" requiring reinitiation of consultation
 13 on the RMP. Plaintiffs' claim is unavailing for this reason.

14 **c. Legal differentiation between marked and unmarked salmon**

15 In 2005, NMFS amended the then-existing 4(d) Rules, including the rule for Puget Sound
 16 Chinook, to apply their protection to both natural fish and hatchery fish with an intact adipose
 17 fin. See 70 Fed. Reg. 37160, 37195 (June 28, 2005); 50 C.F.R. § 223.203(a) ("The prohibitions
 18 of section 9(a)(1) of the ESA . . . relating to endangered species apply to anadromous fish with
 19 an intact adipose fin that are part of the threatened species of salmonids listed in § 223.102(a)").

20 Plaintiffs contend that the "new" legal differentiation between marked and unmarked
 21 salmon, and the express protection for all unmarked Puget Sound Chinook is "new information"
 22 and should have caused NMFS to reinitiate consultation. See Dkt. #19 at 33-34. Plaintiffs,
 23 argue, without any evidentiary support, that the RMP does not require that fisherman do
 24 anything to protect unmarked salmon, and as a result, under the RMP fisheries have a greater
 25 impact on threatened Chinook than NMFS recognized before it drew this distinction. Because

1 plaintiffs fail to support this assertion with any evidentiary support from the record, the Court
 2 cannot conclude that NMFS's decision not to reinitiate consultation on this issue was arbitrary
 3 or capricious.

4 **d. Escapement data**

5 Finally, plaintiffs contend that a March 2006 e-mail from a NMFS scientist presents a
 6 "gloomy assessment" of the data on salmon returns for key populations in the Hood Canal and
 7 Geogia Strait regions, thereby requiring NMFS to reinitiate consultation to determine whether
 8 fisheries are jeopardizing the survival and recovery of Puget Sound Chinook. See Dkt. #19 at
 9 34-35 (citing AR 272 (e-mail)).

10 The e-mail's author emphasized, however, that the data contained in the escapement
 11 spreadsheet attached to the e-mail was a "preliminary look" and "only part of the picture since
 12 the information on exploitation rates is not yet available." See AR 272; 272-1.

13 Based on this e-mail alone, the Court cannot conclude that NMFS's failure to reinitiate
 14 consultation because of a "preliminary look" at a 2006 escapement data spreadsheet is arbitrary
 15 or capricious. As section 4.0 of the BiOp expressed, NMFS recognized the RMP's adaptive
 16 management policy, and considered that even a change in escapement goals would not be
 17 considered material to reinitiate consultation. See AR 2 at 40-41. Accordingly, plaintiffs have
 18 not shown that the preliminary escapement data in the attachment to the e-mail "reveals effects
 19 of the action that may affect listed species or critical habitat in a manner or to an extent not
 20 previously considered." 50 C.F.R. § 402.16.

21 **III. CONCLUSION**

22 For all of the foregoing reasons, the Court DENIES plaintiffs' motion for summary
 23 judgment (Dkt. ##18, 19) and GRANTS and defendants' cross-motion for summary judgment
 24 (Dkt. ##30, 31). The Clerk of Court is directed to enter judgment accordingly.

1 DATED this 20th day of March, 2008.

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4 Robert S. Lasnik
5 United States District Judge
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26 ORDER DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANTS' CROSS-
MOTION FOR SUMMARY JUDGMENT